

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMPANY PETITION NO.196 OF 2004

M/s.Castrol Limited .. Petitioner

Vs.

M/s.Admiral Shipping Ltd. .. Respondent

A N D

COMPANY PETITION NO.197 OF 2004

M/s.Castrol Limited .. Petitioner

Vs.

M/s.Sunrich Ship Management
Pvt.Ltd. .. Respondent

Shri B.Soman i/b Mr.Sanjay Udeshi & Co. for the
petitioner

Shri M.L.Palan i/b M/s.Ajmerwala & Co. for the
respondent company

CORAM: S.U. KAMDAR, J.

DATE : 1ST APRIL, 2005

ORAL JUDGMENT:

1. These two petitions can be conveniently disposed off together because the facts in both the cases are substantially identical and the defence

raised by the company is also substantially similar. Few facts of the company petition no.197 of 2004 which were argued at length before me are briefly enumerated as under:

2. During the period June 1999 to February 2000 the petitioner supplied goods to the respondent as per the Purchase Order placed by the respondent company with the petitioner. The goods supplied were to provide various kind of lubricants and oil to the vessel being M.V.Sea Grace I and MVC Jane I. In respect of the said goods sold and supplied by the petitioner to the respondent company the petitioner issued various invoices to the company for supply of the said goods.

3. It is the case of the petitioner that as on 25.2.00 there was an outstanding amount of US\$ 62,046.96 as due and payable by the respondent to the petitioner company. It is further the case of the petitioner that a cheque for a sum of US\$ 22,000/- towards part payment was issued by one Glenrich Limited being one of the group companies of the respondent herein. The said cheque was presented on 5.4.00 but

the same has been dishonoured. On 5.5.00 another group company namely Admiral Shipping Limited which is respondent in Company Petition No.196 of 2004 issued a letter inter alia admitting the liability and promising that the payment will be made by third week of 2000. The said letter dt.5.5.00 inter alia reads as under:

"However, we would like to request you to bear with us till 3rd week of May 2000 by which time Mr.Shabbir Rangwala will be in London and will effect your payment immediately."

4. However, inspite of the said assurance since the payment was not forthcoming, on 13.6.00 another letter was addressed by the petitioner demanding the aforesaid payment. On 14.6.00 once again the said company Admiral Shipping Ltd the respondent in Company Petition No.196/04 requested time for making payment but at the same time inter alia requested that the supply of the goods should not be disrupted and the same should be continued. In the said letter dt.14.6.00 it has been inter alia mentioned that the payment could not be made because Mr.Shabbir Rangwala had met with a major accident and was admitted to the Hospital and

because of his long ailment he was not able to visit London and thus, there was a delay in making payment. However, the said letter further admits the liability to pay. The relevant portion of the said letter reads as under:

"We shall make our best efforts to atleast clear a long pending cheque of USD 22,000/- at our earliest. For the reasons cited above please do not withhold any future supplies for the sake of payment, for which we seek kind support and cooperation.

5. On 19.6.00 another letter was addressed by M/s.Admiral Shipping Ltd., again promising to make payment of the aforesaid amount. There are various such letters of acknowledgement of liabilities. Ultimately since payment was still not forthcoming on 10.4.02 petitioner issued statutory notice to the respondent company u.s.433 and 434 of the Companies Act 1 of 1956 and demanded payment failing which winding up proceedings would be initiated against respondent company. On 24.4.02 respondent company addressed a letter through their advocates in which for the first time it was contended that the respondent company is not liable to pay because the respondent company is merely a

technical agent at Mumbai of principal known as Glenrich Ltd. U.K. It was also mentioned in the said letter that it is M/s.Glenrich Ltd who has merely appointed the respondent company for attending to the mechanical defects and carrying out repairs to the vehicles which belong to and are managed by the said Glenrich Ltd. It was contended that the orders were placed by Glenrich Ltd with the petitioner both of which are UK Companies and that the respondents have not placed any orders whatsoever for the supply of the said goods. It was further mentioned therein that the part payments which were alleged to have been received by the petitioner were also made by the said UK firm of Glenrich Ltd and not respondent company. Accordingly, the liability to make payment was denied by the respondent company.

6. In view of the aforesaid position, the present petition is filed u.s.433 and 434 of the companies act, 1 of 1956 for winding up of respondent company. An affidavit in reply has been filed on 24.3.05 of one Mr.Shabbir Y.Engineer in which it has been interalia contended that the

marine lubricants were not delivered or utilised by the company and invoices for the same were also raised by the petitioner in the name of Glenrich Ltd. UK as the orders were placed by Glenrich Ltd. It was thus contended by the respondent company that it is not at all liable for the payment claimed by the petitioner. It has been contended that the petition filed as against respondent company is frivolous and thus, the same should be decided.

7. It has also been contended that the petitioner has already filed a suit for the recovery of the said amount being Summary Suit No.3040 of 2004 and therefore the present petition should not be entertained. In Para 8 of the affidavit in reply it has been denied by the company that the company is one of the companies under the name of Sunrich Group of Companies . It has also been contended that the respondent company is a separate legal entity and acts independent to the said Glenrich Ltd. In the said affidavit in reply thereafter there are various denials in respect of claim of the petitioner. A specific

grievance has been raised in para 9 of the affidavit in reply and it is contended that the petitioner has till date avoided giving inspection of the Purchase Orders to the company's advocate. By a letter dt.24.4.02 it has been contended that the petitioner are intentionally not giving the inspection of the said documents. In so far as various admissions of liability are concerned the same are sought to be passed off by contending that the same has to be dealt with by Admiral Shipping Ltd. and the Respondent company is not concerned with the same because it is not the respondent company who has admitted the aforesaid liability. On the aforesaid contention it has been contended that the petition should be dismissed.

8. In view of the specific grievance raised in the said affidavit pertaining to the inspection of documents I specifically directed the petitioner to submit to the respondent company entire xerox copies of all purchase orders, invoices and other correspondences and documents including challans/Receipts so as to enable the respondent to deal with the case on merits. Pursuant thereto,

the complete compilation of documents were furnished by the petitioner to the respondent company and copy thereof is also filed and the same is taken on record. The learned counsel Mr.Palan for the respondent company sought time to verify the genuineness and veracity of the documents. Copies of which were furnished to him. Such time was granted. He verified the documents and thereafter the matter was taken up for hearing on 10.3.05. On 10.3.05 the matter was once again adjourned to 11.3.05. The matter was thereafter argued at length on 11.3.05. The learned counsel for the respondent company argued the matter by relying upon these very xerox copies of the documents. After conclusion of the hearing I directed the petitioner to file an additional affidavit to explain the basis on which they have raised the claim in US \$ and not in Indian Rupees. Pursuant thereto on 17.3.05 petitioner filed an additional affidavit which was tendered in the Court on 18.3.05 when the learned counsel for the respondent company sought further time to file further affidavit in reply to the said affidavit dt.17.3.05. The matter was accordingly adjourned

to 24.3.05 and on 24.3.05 the learned counsel for the respondent company has tendered affidavit dt.24.3.05 of one Mr.Shabbir Engineer. Both these affidavits dt.17.3.05 and 24.3.05 are taken on record. Matter was thereafter heard once again.

9. The learned counsel at the time of earlier hearing on 11.3.05 advanced 3 basic contentions. It has been contended by the learned counsel for the respondent company that the respondent is not liable to make payment of the aforesaid amount as the respondent company has not placed any purchase orders. It has been contended that the purchase orders which are signed by the company are signed in their capacity as an agent and not as principal. It has been contended that the purchase orders are placed by the petitioner as an agent of M/s.Glenrich Ltd. U.K. and thus the liability is not of the respondent company but that of the third party namely Glenrich Ltd., U.K. It is also contended that though the invoices are issued in the name of the company and they have received the same still they are not liable to make payment of the aforesaid amount because orders are not placed

by them.

10. The learned counsel Mr.Palan has contended that the liability is not that of the petitioner but that of the M/s.Glenrich Ltd because the respondent company was merely acting as an agent of the said company. The learned counsel has further contended that u.s.230 of the Indian Contract Act the liability of the petitioner cannot be personally enforced against the agent because there is no contract between the respondent company and the petitioner but the only principal is liable which is a foreign company. The said s.230 of the Indian Contract Act interalia reads as under:

"230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor he is personally bound by them."

Presumption of contract to contrary-Such a contract shall be presumed to exist in the following cases-

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad:

(2) where the agent does not disclose the name of his principal:

(3) where the principal, though disclosed, cannot be sued."

11. The learned counsel for the respondent company has also relied upon the Judgement of the single Judge of this Court in the case of Midland Overseas Vs. CMBT Tana and others reported in AIR 1999 Bombay 401 and it has contended that in view of the Judgment of this court u.s.230 respondent company is not liable to make payment of the amount due and payable to the petitioners herein. The learned counsel has thereafter relied upon another Judgment of this court in the case of Mackinnon Mackenzie & Co. Vs. Lang, Moir & Co reported in 1881 The Indian Law Reporter Vol.5 Pg 584 and has contended that if there is actual knowledge to the petitioner about the name of the principal then the company is not liable to make any payment and the only principal is liable for the same.

12. The learned counsel has contended by relying upon the aforesaid judgment that in the present case also petitioners were aware that the principal in respect of the said transaction was

the said company M/s.Glenrich Ltd. U.K. and that the respondents were only acting as agent. The learned counsel has thereafter relied upon the Judgment of the Lahore High Court in the case of Lyallpur Sugar Company through Surjan Das, Manager and Mathra Das, Partner Vs. Mul Raj Agent, Sugar Company at Jullundur City reported in 1921 Indian Cases Vol.LXV Pg.473 and has contended that the disclosure of agent is not necessary once it can be said that the petitioner was aware of the principal for whom the respondent company was acting as an agent. It has been further contended that the petitioner has not filed the rejoinder controverting the various averments made by the petitioner and therefore the same be taken as true and correct and the petition should be dismissed on the ground that no ground is made out for the purpose of winding up of the respondent company.

13. By an additional affidavit dt.24.3.05 the company has once again raised the grievances about the inspection of the documents. Infact on 23.3.05 the learned solicitor of the respondent company has addressed a letter to the petitioner and has

interalia contended that the petitioner has not given inspection of the invoices to the respondent company despite being repeatedly called upon to do so and called upon the petitioner to produce originals at the time of hearing of the petition. Even in respect of the other documents also once again the grievance of the inspection has been made. This grievance is deliberately made even after furnishing the xerox copies of the documents and hearing the matter on merits at length on 11.3.05.

14. I have heard the parties at length and considered the rival submissions in the matter. Provision of s.230 of the contract act on which reliance has been placed by the respondent company inter alia stipulates that where the contract is executed by an agent for the sale or purchase of goods for a merchant residing abroad there is a presumption in law that there exists a direct contract by and between the contracting parties themselves and an agent is liable as if he himself is principal. There is also a second presumption under clause 2 of section 230 wherein it is

provided that when the agent does not disclose the name of the principal there is still a presumption that there is a direct contract as principal to principal between the contracting parties. In the present case, on a plain reading of purchase order and invoice it is clear that the respondent has not disclosed the name of a principal on whose behalf he was acting as agent. However, Mr. Palan learned counsel for the respondent company has stressed on the word "Agents" at the place of the signature on the said Purchase Orders and has contended that though the purchase orders are signed by the respondent company and the name of the principal is not disclosed in the purchase order still the fact that it is mentioned that the respondent company has signed as an agent is by itself sufficient to hold that the petitioner was aware that the respondent company is not liable to make payment and it is the third party principal who is liable to make payment.

15. It has been vehemently contended that in view of the provision of s.230 there is no liability of the respondent company to make payment

even though the purchase orders are signed by the respondent company. Invoices are raised on the respondent company, receipt notes are received by the respondent company. It has been alternatively contended that since the contract was for supply of material to a vessel and every vessel is registered in the name of the person or the owner and in view thereto the petitioner is deemed to be aware of the name of the principal and thus, it should be presumed that there is a disclosure of the principal by the respondent company. The Judgments relied upon of the learned single Judge in the case of Midland Overseas Vs. CMBT Tana and others reported in AIR 1999 Bombay 401 (Supra) has no merits. In para 6 of the said Judgment it has been stated as under:

"6. On these admitted facts which have been pleaded by the plaintiffs themselves in the plaint the question that arises for determination is whether any cause of action has accrued against the 3rd defendants who had only acted as agents for and on behalf of 2nd defendants. The agent cannot personally enforce nor be bound by, contracts on behalf of principal. Ordinarily an agent contracting in the name of his principal cannot be sued on such contracts. The agent in such circumstances is also not entitled to sue in his name. This position emerges from Section

230 of Contract Act which reads thus:

"230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor he is personally bound by them."

Presumption of contract to contrary-Such a contract shall be presumed to exist in the following cases-

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad:

(2) where the agent does not disclose the name of his principal:

(3) where the principal, though disclosed, cannot be sued."

It is apparent that the principal is disclosed and has been impleaded as 2nd defendant. It is further admitted case in the plaint that the 3rd defendant acted as an agent of the 2nd defendant and the container was accepted by the 3rd defendant on behalf of the 2nd defendant. In the circumstances, where the principal is disclosed and has been impleaded as defendant no.2, no action would lie against the defendants no.3 who are only agent of defendant no.2. There is not even a whisper in the entire plaint that the 3rd defendants acted independent of 2nd defendant or that the container was accepted by the 3rd defendants in the capacity of their own or the 3rd defendants while contracting undertook any personal liability under the said contract."

16. The judgment in the case of Mackinnon Mackenzie & Co. Vs. Lang, Moir & Co reported in 1881 The Indian Law Reporter Vol.5 Pg 584 (Supra) also has no application to the present case because

there was also an admitted position that the company was aware of the fact that the other contracting party was acting as an agent for a third party whose name was already known to the contracting party. In the present case there is no material to show that at any point of time there was a disclosure by the respondent company to the petitioner that they are acting as an agent of Glenrich Ltd. U.K. Apart from the aforesaid issue, Mr.Palan has contended that the admissions of liability by M/s.Admiral Shipping Ltd are not binding on the respondent company nor the part payment made by the other sister concern M/s.Glenrich Ltd. is binding on the respondent company and therefore also there is no liability of the respondent company to make payment. I am of the opinion that irrespective of the fact that there is an admission of liability by the said company and even by ignoring the said admissions of liability still on merits itself the respondent company is liable to pay because the respondent company has entered into the contract by placing purchase orders without disclosing the name of the principal and/or on behalf of the principal who is

a foreign merchant. Respondents have received the invoices and have accepted the same without any protest nor at any time did the respondent company direct the petitioner to claim the amount from the said so called principal Glenrich Ltd. However in company petition no.196 of 2004 respondent company is Admiral Shipping Ltd itself and each of the aforesaid admissions of liabilities are by the respondent company. Thus in company petition no.196 of 2004 there are not only purchase orders issued and invoices raised but there is also an admission of liability by the said company.

17. Apart from the aforesaid contention on merits in the present case the advocates for the respondent company have not been fair and honest to the court. Inspite of the fact that the petitioner was directed to furnish xerox copies of the entire documents of compilation which the petitioner did furnish and further inspite of the fact that the time was granted to the respondent company to verify the veracity the genuineness of the said documents and after doing so and having argued the matter at length on 11.3.05 the learned advocate has indulged in creating evidence by addressing another letter raising still a grievance of inspection being letter dt.23.3.05 and by affidavit dt.24.3.05 the same has been filed in this Court. The matter was not only heard but learned counsel Mr.Palan has also advanced the arguments. The said arguments proceeded on the footing that the grievance of the inspection is fully resolved. Mr.Palan infact has relied upon the very same compilation to argue in support of his case but still these grievances of inspection is reiterated by the aforesaid letter.

18. There is also another aspect in the matter which also indicate that the respondent company is not honest i.e. the compilation of documents which were furnished to the respondent company inter alia contains a document which is a xerox copy of the greeting card issued to the petitioner by the respondent company. This card inter alia states that there are various companies of Mr. Shabbir Y. Engineer and the list of the companies are given on the said card include the respondent company in both the present petitions alongwith M/s. Glenrich Ltd. In spite of the aforesaid evidence being furnished to the respondent company in compilation of documents still respondent company has in para 3 of the affidavit dt. 24.3.2005 denied that the company operates along with various other group of companies. Para 3 of the said additional affidavit reads as under:

"3. With reference to paragraph 2 of the said affidavit, I again deny that the Company operates alongwith its various or other group/sister companies jointly from the same offices or under the same management or in the name of the Sunrich Group of Companies. I deny that the Company

represents itself or carries on business commonly or alongwith its group/sister companies as part of the Sunrich Group of Companies. I repeat that the Company is an independent entity operating on its own."

19. In view thereto I find that the defence raised by the respondent company is not bonafide and in fact a desperate attempt to avoid liability by resorting to any possible contentions.

20. In the aforesaid circumstances, I find that there are no serious bonafide defences raised by the respondent company but with a view to give an opportunity and in view of the fact that the petitioners have already filed the suit I pass the following order:

(i) Respondent company is directed to deposit in court within 6 weeks from today in Company Petition No.196/2004 an amount in Indian Rupees of USD 75000/- at the exchange rate prevailing on 11.3.05 and in Company Petition No.197 the amount would be equivalent of USD 50,000/-

(ii) If such an amount is deposited then the same

should be transferred to the credit of the Summary Suit No.3040/2004 and the same should be invested in Fixed Deposit by the Prothonotary & Senior Master High Court Mumbai in any Nationalised Bank initially for a period of 3 years and renew the same from time to time till further orders from this Court.

(iii) In an event if the said amount is not deposited within the stipulated period of time then in that event the petition to do stand admitted and advertised. in Free Press Journal, Janmabhoomi and Maharashtra Government Gazette. The petitioner to deposit a sum of Rs.2,000/- in the office of Prothonotary and Senior Master.